PP

v.

MOK KAR POH

HIGH COURT MALAYA, JOHOR BAHRU
ZAINUN ALI J
[CRIMINAL TRIAL NO: 45-22 OF 1999]
20 SEPTEMBER 2000

CRIMINAL PROCEDURE: *Trial - Prima facie case - Whether case made out - What constitutes prima facie case*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Drug offence - Element of possession - Meaning of possession - Exclusivity of custody and control - Whether established*

EVIDENCE: *Expert evidence - Identification of substance suspected to be drugs by chemist - Principle applicable in identifying the drugs - Whether complied with - Whether failure to comply with such evidence fatal to case*

According to the facts of the case, a police party comprising three groups rushed to the accused who was at that time, in a car. The accused subsequently opened the door of the car and was immediately arrested and handcuffed. A body search was conducted but nothing incriminating was found on the accused. However the inspection and investigation of the car revealed a bag containing substance suspected to be dangerous drugs. The Investigating Officer then handed the exhibits to the chemist for analysis.

The issue for consideration was: (i) whether a *prima facie* case had been made out by the prosecution; (ii) whether the prosecution had proved that the accused was in possession of the drugs; and (iii) whether the chemist had followed the proper procedure in analysing the substance.

Held:

[1] A *prima facie* case, though not conclusive, is a case which is sufficient to call for an answer. It is incumbent that there be credible evidence on each and every essential ingredient of the offence. Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. A *prima facie* case therefore is one which is not inherently incredible which, if unrebutted would warrant a conviction.

[2] A moveable thing is said to be in possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons and when the circumstances are such that he maybe presumed to intend to do so in case of need.

[2a] Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inferences from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case.

[2b] Exclusivity of custody and control of the drugs has to be established by the prosecution beyond reasonable doubt. That the prosecution failed to do based on the fact that: (i) the drugs in question were not found on the person of the accused; (ii) the investigating officer disregarded the background of the accused and the facts and circumstances surrounding the case; (iii) the prosecution failed to adduce evidence regarding the length and duration of the time the accused was in the car prior to his arrest. Therefore there was no observation by the raiding party on the pre-arrest movement of the accused; (iv) evidence that the car was sent to the workshop for servicing on the same day was confirmed by the investigating officer and that a pair of ladies' shoes and a pair of stockings were found in the boot of the car leading to the possibility of others having had access to the car; (v) the prosecution failed to adduce evidence to negate the accessibility of others to the car; and (vi) failure of the prosecution to link the accused with the drugs, such as dusting the packets for fingerprints and failure to take hand swabs or nail clippings from the accused to show whether there were traces of drugs on his hands.

[3] Two of the prosecution witnesses gave conflicting accounts of what had actually transpired. Therefore where there are two inferences, the one most unfavourable to the accused ought to be accepted.

[4] For the purposes of analysis, the rule requires the chemist to take out a minimum of 10% of the drugs from the receptacle in which the drugs were found. The chemist testified that he took out more or less 4 g. However in the type of case where the opinion of the chemist is confined only to the elementary nature and identity of the substance, the court is entitled to accept the opinion of the expert on its face value, unless it is inherently so incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion.

[Accused acquitted and discharged.]

Case(s) referred to:
Chan Pean Lean v. PP [1956] MLJ 237 ***(foll)***
Cheong Kim Siong v. PP [1968] 1 MLJ 36 ***(cit)***
Leong Boon Huat v. PP [1993] 3 CLJ 603 ***(dist)***
Loo Kia Meng v. PP [2000] 3 CLJ 653 ***(dist)***
Munusamy v. PP [1987] 1 CLJ 250 ***(foll)***
PP v. Lim Lian Chen [1992] 1 CLJ 2086 ***(foll)***
PP v. Ong Cheng Heong [1998] 4 CLJ 209 ***(foll)***
Syed Ali Syed Hamid v PP [1982] 1 MLJ 132 ***(cit)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 37(d), (g), (h), (j)

For the prosecution - Ishak Yusoff; DPP
For the accused - Teh Poh Teik; M/s Teh Poh Teik & Co

Reported by Mariette Peters-Goh

JUDGMENT

Zainun Ali J:

Decision

The facts of this case are mundane enough, representing much of the normal *modus operandi* of the police with regard to the ambush, apprehension, investigation and subsequent indictment of the accused person for a drug offence. Despite the many judicial observation and criticisms in past cases to certain investigative lapses, it is obvious that these have slid down, unheeded.

The facts of the case are these.

The police led by Inspector Mohd Zulkifli bin Daud laid an ambush on the target at Jalan Desa Jaya, Taman Desa Jaya, Johor Bahru on 2 November 1998 at about 7.30 p.m.. The police party comprised three groups which had various tasks of apprehending the target. A previous briefing given indicated that the target's vehicle is a Proton Wira car bearing registration number JFA 6182.

The police party reached the scene at 9 p.m.. According to the testimony of PW2 (Insp. Mohd. Zulkifli) he and his group rushed to the target, took out his (lnsp. Mohd. Zulkifli's) identification card, shouted that they are the police and tried to open the door of JFA 6182. It was locked from the inside. After about three minutes, the target, a Chinese male (the accused) opened the door of the vehicle.

According to PW2, he and his party of men immediately arrested the accused and handcuffed him. PW2 made a body search, found several personal effects but found nothing incriminating.

It was PW2's testimony that at that time the lighting from the street light and from the lights from the police vehicles gave more than adequate lighting to the whole scene.

The inspection and investigation by the police of the vehicle JFA 6182 revealed a bag containing material which is suspected to be dangerous drugs. The offending bag was found at the foot rest near the front passenger seat. The said bag is an opaque black paper bag with the words 'Versace' written on it.

Thereafter the usual procedures of taking the accused and the drugs back to the police station, making a report and preparing the search list were all made. The exhibits were then handed over at 10.30 that night to PW8, the investigating officer (I.O.), one lnsp. Arsad Kamarul at Jabatan Narkotik, IPD, Johor Bahru.

The testimony of PW4, one L/Korporal Mohd Arif bin Alias was basically similar to the testimony of PW2 as regards the ambush, save in one respect, i.e., the reaction of the accused shortly after the door of the vehicle was opened.

PW2 said nothing about the accused's conduct at the time of his arrest, whereas PW4 testified that the accused tried to run away.

The I.O. (PW8) testified that he made the usual markings on the exhibits before handing them over to the chemist, PW7.

From the cross-examination, it could be elicited that apart from the perfunctory role he played in sending the exhibits to the chemist, the I.O. seemed to do nothing else besides, with regard to the investigation of this case. In fact in cross-examination, he displayed utter ignorance about the surrounding circumstances of the case.

The saving grace, if at all it can be called that, appears to be that of the testimony of the chemist, PW7. PW7 gave a graphic and comprehensive account of the analysis he made of the drugs in question.

The question before this court is whether on the evidence adduced thus far by the prosecution, it had proven its case against the accused on a *"prima facie"* basis.

As had been postulated in several authorities, a *prima facie* case though not conclusive is a case which is sufficient to call for an answer. It is also recurrent in all these authorities that although not conclusive, it is incumbent that there be credible evidence on each and every essential ingredient of the offence.

As had been further emphasised in *PP v. Ong Cheng Heong* [1998] 4 CLJ 209, "credible evidence is evidence which has been filtered and which has gone through the process of evaluation".

The court there went on to add that "any evidence which is not safe to be acted upon, should be rejected". Thus *prima facie* evidence is one which is not inherently credible which is if unrebutted, would warrant a conviction.

As submitted by the learned deputy public prosecutor (DPP), the prosecution in this case will rely on circumstantial evidence and the necessary inferences therein.

What then, are the circumstances and inferences relied upon by the prosecution?

Firstly, the prosecution's case is that the accused was the sole occupant of the car, which car belongs to him. The drug was found at the foot rest of the front passenger seat. The DPP's contention is that there is therefore proximity which may give rise to possession.

This court finds that whether there is possession or not due to proximity, depends very much on the facts and circumstances of each case.

It was unfortunate that the learned DPP chose to cite *Chan Pean Lean v. PP* [1956] 22 MLJ 237 to support his submission on the question of "possession", for in this court's view, that authority is anathema to his contention.

In *Chan Pean Lean*, "possession" as regards the criminal law is defined by Stephen's Digest as follows:

> A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons and when the circumstances are such that he may be presumed to intend to do so in case of need.

Taken at its most basic construction, it would appear to this court that there is to be both a physical and mental element before possession can be made out.

From the skeletal account of the facts adduced thus far, it is difficult to see whether the accused had some *animus possidendi*.

From the words of Thomson J, in *Chan Pean Lean*, "intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inferences from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case."

Thus the mere fact that the said offending article (*ie*, the drug) was in physical proximity to the accused does not *ipso facto*, give rise to the inference that the accused intends to deal with it as if it belonged to him.

The judge in *Chen Pean Lean*, went on to say that, "there must be some evidence that I am doing or having done something with it that shows such an intention. Or it must be clear that the circumstances in which it is found show such an intention." But here, is there evidence to this effect?

Firstly, the drugs in question or any trace thereof, were not found on the person of the accused. Although this in itself is not conclusive evidence, in the absence of any direct link between the accused and the drugs, this court would be hard put to find that the question of direct and exclusive possession can be successfully invoked.

The learned DPP made a valiant attempt at proving his case by circumstantial evidence. However, it is clear that the onus upon it is a heavy one since evidence must point irresistibly to the guilt of the accused.

There are obvious gaps in the prosecution case which may proved to be fatal. (See *Cheong Kim Siong v. PP* [1968] 1 MLJ 36 and *PP v. Lim Lian Chen* [1992] 1 CLJ 2086).

The gaps in the prosecution case could only be attributed to the less than diligent investigation conducted by the I.O. in this case.

Secondly, as mentioned in the earlier part of this judgment the I.O. (PW8) had done nothing more than made markings on the packets of drugs and handing them over to the chemist. He seemed to have disregarded the background of the accused and the facts and circumstances surrounding the case. It is unfortunate that these omissions only serve to weaken the strands of circumstances upon which the case of the prosecution depends.

The prosecution seemed to suggest that the fact that the accused is the owner of the vehicle (JFA 6182) puts him in a position which is worse off than that of the accused in cases such as *Teoh Lay Hock* and *Peh Eng Guan* (unreported) cited by the learned defence counsel.

Thirdly, this court agrees with the learned counsel for the accused that the prosecution had not adduced any evidence as regards the length and duration of time the accused was in the car prior to his arrest. It is this court's view that an observation by the raiding party on the pre-arrest movement of the accused may well throw some light on the circumstances surrounding this case failing which circumstantial evidence which is relied upon by the prosecution is positively weakened and possibly negatived. In the absence of any evidence

of possession within the meaning of the *Chan Pean Lean* rule, nothing could therefore be inferred that the accused intends to deal with the drug as if it belonged to him.

In the words of Edgar Joseph Jr (SCJ) as he then was in *Lim Lian Chen v. PP*:

> ... For example, there was nothing to indicate for how long in all the respondent had been in charge of the Honda and such evidence as had been adduced indicated that he was seen only briefly at the wheel ...

As happened also in the present case.

Fourthly, the evidence that the said car was sent to the workshop for servicing on the same day based on DID 18 on 2 November 1998 was confirmed by PW8. It was confirmed by PW8 that the car was sent to the workshop by accused's brother Mok Kai Leong. It was also confirmed by PW8 that there was a pair of ladies shoes and a pair of stockings in the boot of the said car.

This court is mindful that these various confirmations by PW8 were through questions put to him in cross-examination which merely serve to lay out or give notice of the lines of defence. Nevertheless they were *not challenged* by the prosecution.

Although it is the defence's contention that the shoes and stockings belonged to one Miss Ho Eik Heong (the girlfriend of the accused) this evidence is not verified; that this indicates the possibility of others having had access to the said car, is undoubted.

Fifthly, what is curious is that the prosecution took **no** steps to exclude these people, despite the judicial observation in previous cases that those offending gaps in the prosecution case would cause them dear. The bottom line is, there is no evidence led by the prosecution that the accessibility of others to the said car is excluded.

As had been decided by a long line of authorities, exclusivity of custody and control of the drugs has to be established by the prosecution beyond doubt. The prosecution had failed to do so here.

The next circumstantial evidence and inference relied upon by the prosecution turned on the question of the accused's conduct. Both PW2 and PW4 gave conflicting accounts alluded to earlier, but the principle in *Tai Chai Keh* ought to be followed, i.e., that where there are two inferences/versions, the one most favourable to the accused ought to be accepted.

Next comes the question of the fingerprints of the accused. It is the defence's contention that the failure of the prosecution to dust the six packages for fingerprints and the failure to take hand swaps or nail clippings from the accused to show whether there are traces of drugs on his hands, would be to their detriment, since it does not show any link between the accused and the drugs. Possession is also not to be inferred in the absence of this nexus.

Although this court concedes that the above methods in some situations are merely procedural, it would be a wise prosecution which would do all things necessary to bring home the charge. It is almost careless and capricious to say that since the accused was arrested on the spot and his identity is known, what good would taking fingerprints and nail clippings do?

It is this court's view that it would be prudent for the prosecution not to be oblivious to the obvious methods required to close the gap.

Thus it is clear from the facts and surrounding circumstances, that the question of custody and control and by necessary implication, **possession** which is in nature, is not made out by the prosecution. Since knowledge is a vital element to impute possession and in the absence of any evidence of actual knowledge, it therefore cannot be said with conviction that the circumstances clearly and irresistibly point to the fact that the accused had knowledge of the said drugs.

From the facts adduced thus far, this court finds that the relevant statutory presumptions in ss. 37(d), (g) and (h) have no application in this case (see *PP v. Lim Lian Chen* [1992] 2 MLJ 561 and *Syed Ali Syed Hamid v. PP* [1982] 1 MLJ 132 and *PP v. Teoh Lay Hock*.

Finally comes the question of the chemist's analysis of the drugs.

Counsel for the accused found fault with the way the chemist conducted the analysis and submitted that the chemist had run foul of the rule laid down in *Loo Kia Meng v. PP* [2000] 2 AMR 1831.

The rule in *Loo Kia Meng* requires the chemist to take out a minimum of 10% of the drugs from the receptacle in which the drug was found for purposes of analysis.

The gross weight of all the packets as testified by the chemist is as follows:

(i) E1 - 464.1 grams

(ii) F1 - 464.0 grams

(iii) G1 - 466.5 grams

(iv) H1 - 465.7 grams

(v) I1 - 463.1 grams

(vi) J1 - 462.7 grams

The chemist testified that he took out more or less 4 grams for purposes of analysis from each of the plastic packets marked E1 to J1. Thus in terms of percentage this means that he took out more or less 1% only from **each** packet, thus making it a total of more or less 6%, which the defence counsel submitted, is contrary to the rule in *Loo Kia Meng* and is therefore fatal to the prosecution's case.

Interestingly, upon cross-examination, the chemist stood his ground, that despite being aware of the rule in *Loo Kia Meng* and the provision of s. 37(j) of the Dangerous Drugs Act 1952, he did not observe them.

In view of his long career span of more than 22 years as a chemist, it is intriguing that a man should choose this course of action **unless** he is aware that it is perfectly within the accepted norms of his discipline to conduct the analysis this way and that it is legally acceptable.

In that connection, it might be noted firstly that the drugs in this case is **heroin**. Because most methods – qualitative and quantitative used within forensic science laboratories for the examination of drugs require very small aliquots of material it is vital that these small aliquots are entirely representative of the bulk from which they have been drawn.

From the evidence of the chemist PW7, it is clear that he had taken the drugs and had it homogenised.

This court is mindful of the decision in *Leong Boon Huat v. PP* where the Supreme Court was quite reticent about the definitive quantity to be tested. The court had said that:

> ..... What would be adequate quantities for this purpose would depend upon the particular circumstances of each case and we do not consider any useful purpose would be served by laying down any mathematical formula .....

It must be borne in mind though, that the drugs in *Leong Boon Huat*'s case was **cannabis** and not heroin as in the present case. Thus the method of analysis may differ since in the case of heroin which is frequently encountered as a fine powder, the material should be thoroughly homogenised.

This court accepts the chemist's assertion that the blending process will make it homogenised.

In this case there is no evidence led by the defence to challenge the evidence of the chemist. Since the chemist's testimony stands on solid ground, this court is reminded of the observation of Azmi SCJ in *Munusamy v. PP* [1987] 1 CLJ 250 FC where his Lordship said:

> ... We were therefore of the view that in this type of cases where the opinion of the chemist is confined only to the elementary nature and identity of substance, the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible, or the defence calls evidence in rebuttal by another expert to contradict the opinion ...

Thus in the case of the homogenised heroin and in view of the ability of the homogenised substance to be analysed even if a small amount of aliquot of heroin is taken, it would be sufficient for it to be representative of the bulk. Thus it is this court's view that the ruling in *Loo Kia Meng* can be distinguished on this point.

In the circumstance, despite the court's acceptance of the evidence of the chemist, this court is satisfied on the facts and authorities cited that the prosecution had failed to prove a *prima facie* case against the accused.

The accused is therefore acquitted and discharged without his defence being called.